Supreme Court, U.S.
FILED
APR 21 1993

No. 92-903

In The

Supreme Court of the United States

October Term, 1992

POSTERS 'N' THINGS, LTD., and
LANA CHRISTINE ACTY,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

BRIEF FOR PETITIONERS

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April 21, 1993

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QUESTIONS PRESENTED FOR REVIEW

The questions presented for review are:

(1) Whether the Mail Order Drug Paraphernalia Control Act, 21 U.S.C. § 857, is unconstitutionally vague, as applied in this case.

(2) Whether the Mail Order Drug paraphernalia Control Act, 21 U.S.C. § 857, contains a subjective scienter requirement which would require, as a prerequisite to a conviction, proof that a retailer intended that the items be used for illegal drugs.

(3) Whether items considered as per se drug paraphernalia pursuant to an objective standard of 21 U.S.C. § 857 can be used as a basis for a violation under 21 U.S.C. § 841(a)(1).

(4) Whether the proof at trial below was adequate for a jury to find guilt under 21 U.S.C. § 841(a)(1).

LIST OF PARTIES

The Petitioner is Posters 'N' Things, Ltd. and Lana Christine Acty. The Respondent is the United States of America.

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BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 969 F.2d 652. The opinion of the District Couirt is not reported.

JURISDICTION

The Court of Appeals for the Eighth Circuit ("Eighth Circuit") filed its judgment on July 14, 1992. On August 17, 1992, the Eighth Circuit denied a Petition for Rehearing and Suggestion for Rehearing En Banc. A petition for

writ of certiorari was filed on November 11, 1992 and was granted on March 8, 1993. The jurisdiction of this Court rests upon 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Fifth Amendment to the United States Constitution, which provides, in part, "No person shall be . . . deprived of life, liberty, or property, without due process of law . . . "

STATEMENT OF THE CASE

In March of 1990, United States Government Customs agents with special agents, along with agents for the Internal Revenue Service, seized from a merchant, Posters 'N' Things, Ltd., retail store inventory items alleged to constitute drug paraphernalia as defined by the Mail Order Drug Paraphernalia Control Act ("Drug Paraphernalia Act") in violation of 21 U.S.C. § 857. The items to be seized, included, but were not limited to, all materials of any kind which were *primarily intended* for use in manufacturing, compounding, processing, or preparing a controlled substance including "cuts." The search warrant specifically cited mannitol, procaine, and inositol as drug paraphernalia. All the seized items were in their original packaging; none had yet been used.

All of the items seized, including pipes, scales, vitamins and diet aids have legitimate uses. While the warrant sought items primarily intended for use with

controlled substances, the jury was instructed, under Jury Instruction number 37, that the items of evidence including, but not limited to, those listed under 21 U.S.C. § 857(d)(1)-(15), were per se drug paraphernalia. Under this objective approach, the intent of the Petitioners was deemed not relevant to their guilt or innocence under the Drug Paraphernalia Act. The items offered into evidence included mannitol, mannite, and inositol whose sale as drug paraphernalia the government alleged was violative of 21 U.S.C. § 841(a)(1), the statute prohibiting the manufacture of distribution of a controlled substance. The government's witnesses testified that drug paraphernalia was to be determined on a subjective basis with the guilt of the Petitioners to be determined in light of their intent. The government's witnesses stated that the substances mannitol, mannite, or inositol were drug paraphernalia.

Both Petitioners were found guilty on all nine counts. Petitioner Acty was sentenced to 108 months in prison on each count, to be served concurrently. Petitioner Posters 'N' Things was fined $75,000, with a special assessment of $600, for a total amount due of $75,600.

Both Petitioners filed a Notice of Appeal, and an appeal was filed before the United States Court of Appeals for the Eighth Circuit on December 9, 1991 challenging the constitutionality of all of the drug paraphernalia-related charges as well as the sufficiency of the evidence on the money laundering count. On July 13, 1992, a three-judge panel of the Eighth Circuit affirmed Petitioners' conviction and sentence. On August 17, 1992, the Eighth Circuit denied Petitioners' application for rehearing and rehearing en banc.

Petitioners filed a Petition for Writ of Certiorari with the United States Supreme Court on November 16, 1992. The Petition was granted on March 8, 1993.

SUMMARY OF ARGUMENT

The Petitioners were convicted of violations of the Mail Order Drug Paraphernalia Act (four (4) counts for Petitioner Acty, three (3) counts for Petitioner Posters 'N' Things). Acty was found guilty of two (2) counts of aiding and abetting the manufacture and distribution of cocaine and three (3) money laundering counts.

As the District Court noted in the judgment, each count was related to the underlying drug paraphernalia charges. Petitioners contend that the Mail Order Drug Paraphernalia Control Act must be read to contain a subjective scienter element. Failure of the Act to contain such an element must render the Act unconstitutional in violation of the Due Process clause. *Grayned v. City of Rockford*, 408 U.S. 104 (1972).

The Eighth Circuit incorrectly interpreted the Act to contain an objective scienter and upheld Petitioners' conviction despite no proof that the Petitioners intended the items at issue to be used in connection with illegal drugs.

The jury was not even allowed to determine for itself whether certain items were *in fact* drug paraphernalia. Because of this error, Petitioners' conviction under counts 1, 2, 3, 4, 5, 7, 8, and 9 must be reversed. Since those counts form the underlying criminal conduct for the

money laundering charge of count 6, that remaining count must also be reversed.

ARGUMENT

I. THE MAIL ORDER DRUG PARAPHERNALIA CONTROL ACT MUST CONTAIN A SCIENTER REQUIREMENT IN ORDER TO BE CONSTITUTIONAL

Since the enactment of the Mail Order Drug Paraphernalia Control Act, 21 U.S.C. § 857, the federal courts have split as to whether the act contains a subjective scienter requirement. The Second Circuit Court of Appeals held that the act contained a scienter requirement. *United States v. Schneiderman*, 968 F.2d 1564 (2nd Cir. 1992). The Sixth Circuit, in *United States v. 57,261 Items of Drug Paraphernalia*, 869 F.2d 955 (6th Cir. 1989), also read the act to include a scienter requirement, as did the Tenth Circuit in *United States v. Murphy*, 977 F.2d 503 (10th Cir. 1992).

The Eighth Circuit Court of Appeals in this case, however, held that the act expressly did not contain a subjective scienter requirement. Instead, the Court held that objective design features of alleged drug paraphernalia were sufficient to establish a defendant's intent to violate the act.

21 U.S.C. § 857 provides in part:

(d) Definition of "drug paraphernalia"

The term "drug paraphernalia" means any equipment, product, or material of any kind

> which is primarily intended or designed for use in manufacturing, compounding, converting, concealing, producing, processing, preparing, injecting, ingesting, inhaling, or otherwise introducing into the human body a controlled substance in violation of the Controlled Substances Act (title II of Public Law 91-513). It includes items primarily intended or designed for use in ingesting, inhaling, or otherwise introducing marijuana, cocaine, hashish, hashish oil, PCP, or amphetamines into the human body.

The statute lists examples of specific items such as pipes, miniature spoons and bongs which might fit the definition of paraphernalia.

The Eighth Circuit held that the "designed for use" language of the statute created an "objective scienter" sufficient to uphold a conviction. Such an interpretation is at odds not only with the other Circuit opinions concerning the act, but also with a key principle of Anglo-American criminal jurisprudence requiring proof of intent in criminal prosecutions.

a. An Objective Scienter is Disfavored in Criminal Law

It is the Petitioners' contention that Section 857 must be read to contain a subjective scienter requirement in order for the act to meet constitutional requirements. "[T]he existence of a *mens rea* is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence." *United States v. Freed*, 401 U.S. 601, 613, 91 S.Ct. 1112, 1120 (1971) (Brennan, J., concurring), quoting *Dennis v. United States*, 341 U.S. 494, 500, 71 S.Ct. 857, 862 (1951). Even though a statute may not contain an express scienter requirement, that "does not signal a departure from the background assumption of our criminal law" that "criminal offenses requiring no *mens rea* have a 'generally disfavored status.' " *Liparota v. United States*, 471 U.S. 419, 426 (1985), quoting *United States v. United States Gypsum Co.*, 438 U.S. 422, 438 (1978).

This disfavored status was, in fact, one of the motivating factors for courts to read a subjective scienter requirement into Section 857.[1]

It is axiomatic that a finding of criminal liability usually requires a finding of mental culpability. *Morisette v. United States*, 342 U.S. 246, 250-52, 72 S.Ct 240, 243-44, 96 L.Ed. (1952). While Due Process does permit the imposition of strict liability in the criminal context, it is an exception generally limited to statutes and offenses that are regulatory in nature. *Id.*, 342 U.S. at 260. In addition, where strict liability has been imposed in the criminal context, there exists a bright line between legal and illegal conduct.[2] The definition and determination of drug

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[1] "The absence from Section 857 of the Model Act language does not override the presumption in favor of requiring scienter, especially in light of other textual support that Congress intended that Section 857 include a scienter element." *Schneiderman*, 968 F.2d at 1567. See also *57,261 Items of Drug Paraphernalia*, 869 F.2d 955 (6th Cir. 1989).

[2] See *United States v. Allard*, 397 F.Supp. 429, 432 (D. Mont. 1975) (First Offense for selling golden eagle feathers was a misdemeanor where there was no possible dispute as to what constituted a "golden eagle feather"); *United States v. Atkinson*, 468 F.Supp. 834 (E.D. Wisc. 1979); *United States v. Balint*, 258 U.S. 250, 42 S.Ct. 301 (1922).

paraphernalia, however, is far from clear. Legal tobacco accessories or electrical clamps can be used for smoking marijuana and thereby become drug paraphernalia. Vitamins, diet aids, or other chemicals can be used as cutting agents and thereby become drug paraphernalia.

Section 857 is clearly aimed at products with otherwise legitimate uses, and is therefore not a statute "where the standard imposed is, under the circumstances, reasonable, and adherence thereto properly expected of a person." *United States v. Holridge*, 282 F.2d 302, 310 (8th Cir. 1960); *United States v. Freed*, 401 U.S. at 613, n. 4, 91 S.Ct. at 1120. The lack of a clear standard to be applied leaves legitimate businesses and individuals open to arbitrary, erratic, and discriminatory arrests, prosecutions, convictions, and property seizures.

b. Drug Paraphernalia Laws Historically Have Been Required to Contain Proof of Subjective Scienter.

Efforts to outlaw drug paraphernalia began in the state courts in the 1970's. Note, *Paraphernalia for Marijuana and Hashish Use: Possession Statutes and Indiana's Pipe Dream*, 10 Val. U.L. Rev. 353, 354 n. 15 (1975-76). State and local laws against paraphernalia sales and possession were frequently overturned in court as unconstitutionally vague. *Id.* at 593, 594. The void-for-vagueness doctrine has two elements: a citizen's right to fair notice of what is prohibited, and, more importantly, the establishment of minimum guidelines to govern law enforcement. *Kolender v. Lawson*, 461 U.S. 352, 357-58 (1983) (quoting *Smith v. Goquen*, 415 U.S. 566, 574 (1974) (citations omitted)).

The difficulty with drug paraphernalia statutes is that the items used in conjunction with illegal drugs generally have legitimate uses. State and local drug paraphernalia statutes, because of this dual use element, were often successfully challenged as being unconstitutionally vague. See *Geiger v. City of Eagan*, 618 F.2d 26 (8th Cir. 1980). The statue in *Geiger* prohibited the "possession, sale, transfer . . ." of a "drug related device." *Geiger*, 618 F.2d at 27. The statute defined "drug related device" as "any pipe or other object suitable to be used for smoking a controlled substance" with one of five enumerated characteristics. In ruling that the statute was not sufficiently clear to meet due process requirements, the *Geiger* court noted that whether an object was suitable to be used for smoking a controlled substance depended primarily on the ingenuity of drug users. *Id.*, 618 F.2d at 29. See also *Music Stop, Inc. v. City of Ferndale*, 488 F.Supp. 390 (E.D. Mich. 1980); *Magnani v. City of Ames, Iowa*, 493 F.Supp. 1003 (S.D. Iowa, C.D. 1980); *Record Museum v. Lawrence Township*, 481 F.Supp. 768 (D.N.J. 1979).

Without adequate guidance in the laws as to what illegal paraphernalia was, both retailers and law enforcement agencies were left in question as to what products were and were not prohibited. Those State laws were therefore constitutionally invalid.

c. The Model Act Was Created to Address Constitutional Deficiencies

In 1979, the Drug Enforcement Administration (DEA) of the Department of Justice drafted a model proposal for state legislatures in an attempt to create an effective

paraphernalia law which would withstand constitutional challenge. Note, *The Model Drug Paraphernalia Act: Can we Outlaw Head Shops – And Should We?*, 16 Geo. L. Rev. 137, 139 (1981).

The key to the Model Act is the definition of paraphernalia used to avoid a void for vagueness attack.[3] First, the act generally defines paraphernalia as items used or intended for use with controlled substances. Next, the act contains a nonexclusive list of items included in this definition. Then, the act lists fourteen factors courts can consider in determining if an item is in fact paraphernalia. Finally, the act specifically requires proof that a defendant *intended* to sell drug paraphernalia.

A similar law was interpreted by this court to contain a subjective scienter requirement. See *Village of Hoffman Estates v. The Flipside*, 455 U.S. 489, 499, 102 S.Ct. 1186, 1193, 71 L.Ed.2d 362 (1982). *Hoffman Estates* upheld a "designed or marketed for use" definition of paraphernalia in a pre-enforcement challenge to a civil licensing regulation. *Id.*, 405 U.S. at 506.

State laws based on the Model Act uniformly were interpreted to contain a subjective scienter element. In *New England Accessories Trade Association v. City of Nashua*, 679 F.2d 1 (1st Cir. 1982), the Court held that the act

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[3] For a full citation of the Model Act, including comments, see *Model Drug Paraphernalia Act: Hearing before the Select Committee on Narcotics Abuse and Control, House of Representatives*, 96th Cong. 1st Session, pp. 88-95 (1979).

required proof of scienter on the part of the charged defendant. *Id.*, at 6.

In *Casbah, Inc. v. Thone*, 651 F.2d 551 (8th Cir. 1981), the Eighth Circuit was faced with an action by wholesale and retail distributors challenging the constitutionality of a Nebraska statute prohibiting the sale and manufacture of drug paraphernalia. The Court, in upholding the constitutionality of the statute, held that the phrase "intended for use" in the statute referred to the intent of the person charged with the violation. *Id.*, at 559. A similar ruling was also made by the Fifth Circuit in *Tobacco Accessories and Novelty Craftsmen Merchants Association of Louisiana v. Treen*, 681 F.2d 378 (5th Cir. 1982). See also *Record Revolution No. 6, Inc. v. City of Parma*, 638 F.2d 916 (1981).

In *Hoffman Estates* the Supreme Court specifically stated that proof of scienter on the part of the defendant was a requirement in order to prevent the statute from being considered void for vagueness. *Id.*, footnote 17. The ordinance at issue in *Hoffman Estates* required a business to obtain a license prior to selling any items "designed or marketed for use with illegal cannabis or drugs." *Id.*, 455 U.S. at 491, 102 S.Ct. at 1189. The Plaintiff in that case raised a pre-enforcement challenge to the facial constitutionality of the ordinance. *Id.*

Justice Marshall, writing for the majority of the Court, rejected the facial challenge, specifically citing the scienter requirement contained in the phrase "marketed for use." *Id.*, 455 U.S. 499-500, 102 S.Ct. 1194. The Court noted that, while the District Court "apparently relied on the growing vernacular understanding of 'paraphernalia'

as drug-related items . . . , a regulation of 'paraphernalia' alone would not provide much warning of the nature of the items regulated." *Id.*

The Court further determined that the phrase "designed for use" was not unconstitutionally vague on its face since the Plaintiff in the action conceded that the phrase specifically referred to "structural characteristics of an item." *Id.*, 455 U.S. at 501, 102 S.Ct. at 1195.

Justice Marshall's majority opinion stated "[a] business person of ordinary intelligence would understand that this term refers to the design of the manufacturer, *not the intent of the retailer* or customer." *Hoffman Estates*, 455 U.S. at 501, 102 S.Ct. at 1195. (emphasis added). What the District Court and the Eighth Circuit have done in this case is to transfer the manufacturer's intent in design to the Petitioners' intent in marketing, and removed the requirement that the government prove scienter on the part of the retailer.

While the *Hoffman* Court illustrated how an objective scienter could be applied against a designer/manufacturer whose own intent was made clear by the physical characteristics of an item, the Court asserted that the balance of the definition in the *Hoffman* ordinance called for a subjective review of the retailer's intent under the term "marketed for use." "The standard requires scienter, since a retailer could scarcely 'market' items 'for' a particular use without intending that use." *Id.*, 455 U.S. at 502, 102 S.Ct. at 1195.

d. Legislative History of Section 857 Provides Little Guidance As to the Required Intent

In 1986, Congress passed the Act at issue in this case, a close adaption of the DEA's Model Act. *Congressional Record*, S13758 (September 26, 1986). Section 857 is based upon the Drug Enforcement Agency's Model Act as propounded by the Department of Justice in 1979. See *United States v. Main Street Distributing, Inc.*, 700 F.Supp. 655 (E.D.N.Y. 1988). Since that time, numerous state and local governments enacted statutes outlawing the sale of drug paraphernalia. A key difference between the federal law and the Model Act was the elimination of the language specifically requiring proof of a defendant's subjective intent for a conviction under the act.

The *Schneiderman* court, and the other courts finding a subjective scienter requirement in the federal law recognized the change from the Model Act. Those Courts looked to the definition elements, and specifically the fourteen factors, as creating the required element of subjective scienter.

The Eighth Circuit in this case, however, held that the "designed for use" approach created an "objective scienter." The Court stated that certain objects, such as "bongs", were designed exclusively or primarily for use with illegal drugs and thus possession establishes the requisite intent to violate the law.

An "objective" scienter, however, creates a strict liability offense with no finding that a defendant intended to violate the law. Failure to include an intent provision prevents a retailer from having fair notice of what is and

is not illegal, a condition often cured by inclusion of a *mens rea* provision.

The court in *Schneiderman* overturned the District Court and interpreted the statute to contain a subjective scienter requirement. The court found support for this reading of the act from the legislative history:

> Fortunately, the legislative history of § 857 offers some guidance. During hearings on the bill that became § 857, Representative McCullum questioned Representative Levine, the sponsor of the bill, about the intent language. After recognizing that the phrase "designed for use" was clearly very narrow, Representative McCullum asked for clarification of "primarily intended for the use." Acknowledging that scienter was necessary, Representative Levine stated that the government would be "required to prove intent on the part of the defendant in a particular trial" to obtain a conviction under the "primarily intended" standard.

Schneiderman, 958 F.2d at 1567. (citations omitted).

The Eighth Circuit below, however, criticized the use of the limited legislative history to find an intent to include a subjective scienter element in the act. *United States v. Posters 'N' Things, Ltd.*, 969 F.2d 652, 657 (8th Cir. 1992), footnote 3.

The legislative history does indicate that "[i]t would be the intent on the part of the defendant in a particular trial" that was relevant. *United States v. Main Street Distributing, Inc.*, 700 F.Supp. 655, 664 (E.D.N.Y. 1988) (quoting *Mail Order Drug Paraphernalia Control Act: Hearings on H.R. 1625 Before the Subcommittee on Crime of House Committee of the Judiciary*, 99th Cong. 2nd Sess. 19-21 (1986)).

The use of a *manufacturer's* intent in designing a product, or a *customer's* intent in purchasing a product was not intended to impose liability on a retailer absent proof of their subjective intent. It is that transferred intent, from a product's design, however, which was applied in *Posters 'N' Things*, 969 F.2d at 660.

II. THE PETITIONERS' CONVICTIONS MUST BE REVERSED BECAUSE THE ACT AS APPLIED WAS UNCONSTITUTIONALLY VAGUE

a. As Applied, Petitioners' Convictions Under Section 857 Must Be Reversed

The problem with an "objective scienter" is well-illustrated in this case. By determining that certain substances were *per se* drug paraphernalia, the jury was required to find the defendants guilty pursuant to § 857 for items "primarily intended or designed for use" with controlled substances regardless of their intent. Counts 1, 2, 3, 4, 5, 7, 8 and 9 all rely solely or in part on Section 857. Neither the district court nor the Eighth Circuit defined the term "primarily intended."

To be constitutional in its application, the term "intended for use" must allow the finder of fact to determine that the accused has intended or, in this case under § 857, that the defendant primarily intended the items which they sold to be used with controlled substances. In this case, however the district court rejected the clear majority of opinions and specifically informed the finder of fact, under Jury Instructions No. 37 and 39, that the

items listed in the law were drug paraphernalia and the intent of the accused retailer was irrelevant.

Under this objective standard applied by the courts below, it was the Court, rather than the jury, which determined that the substances mannitol, mannite, and inositol were paraphernalia.

These instructions advised the jury to view alleged drug paraphernalia objectively, to find that the items were illegal, and to disregard any intent on the part of the Petitioners. Inserting the court's standard for mannitol, mannite, and inositol in the Drug Paraphernalia Act into a statute which requires intent provides no notice to retailers as to what substances or items will or will not be considered illegal. The Act is therefore unconstitutional as applied in this case.

b. An Objective Scienter Also was Applied with Petitioner's Conviction Under 21 U.S.C. § 841(a)(1)

The objective scienter requirement applied against the Petitioners further manifests itself in the accusation of aiding and abetting in the violation of 21 U.S.C. § 841(a)(1) (manufacture and distribution of cocaine). The government's witnesses testified that mannitol, mannite, and inositol were "objectively" drug paraphernalia and thereby in violation of 21 U.S.C. § 857. Under 21 U.S.C. § 857, the mannitol, mannite, and inositol, were "objectively" viewed in light of the definition of drug paraphernalia which includes items for use in manufacturing, compounding, processing, or preparing a controlled substance. By its own definition, the mannitol, mannite, and

inositol defined and "objectively" charged to the jury, under § 857, required the jury to find that the substances were intended for manufacturing with a controlled substance. The jury was forced to find that the Petitioners aided and abetted in the manufacture of cocaine under 21 U.S.C. § 841(a)(1).

In *Francis v. Franklin*, 471 U.S. 307, 105 S.Ct. 1965, 85 L.Ed.2d 344 (1985), the Supreme Court restated the clear constitutional dictate that a jury charge may not create "a presumption that relieves the State of its burden of persuasion on an element of an offense." *Id.*, 471 U.S. at 315, 105 S.Ct. at 1971. See also *Sandstrom v. Montana*, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979).

By using an objective standard, and thus creating **per se** paraphernalia, the District Court shifted the burden of proof onto the retailers, forcing them to attempt to prove that affected items are not intended for use in connection with controlled substances. Such a standard is a clear violation of the Due Process Clause of the Fifth Amendment to the United States Constitution. *Francis v. Franklin*, 471 U.S. at 315, 105 S.Ct. at 2450, 61 L.Ed.2d 39 (1979).

c. Petitioner's Conviction for Money Laundering Must Also be Reversed

The remaining count of Petitioner Acty's conviction was for money laundering in violation of 18 U.S.C. § 1956(a)(1)(B)(i). To convict Acty of money laundering, the government is first required to prove that she knowingly conducted a financial transaction that involved the proceeds of an unlawful activity. The unlawful activity

alleged in this count is the sale of illegal drug paraphernalia. For the reasons previously stated, those counts must be reversed, and therefore, Count six (6) alleging money laundering must also be reversed.

CONCLUSION

Petitioners, Lana Christine Acty, and Posters 'N' Things were denied their Fifth and Fourteenth Amendment rights to a fair trial when the District Court applied an objective scienter standard. Because of this error, as reflected in the jury instructions, this court should reverse each and every count of Petitioners' conviction. In addition, this court should hold that the Mail Order Drug Paraphernalia Act, 21 U.S.C. § 857, requires proof of subjective scienter as an element for conviction, or in the alternative, that the failure to require this element renders the statute unconstitutional.

Respectfully submitted,

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Date: April 21, 1993